Larsdale, Inc. (Burkart Carolina) *and* International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local Union 265FW. Cases 11–CA–14169 and 11–CA–14401

May 10, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The primary issue in this case is whether the Respondent violated Section 8(a)(5) and (1) by bargaining in bad faith during negotiations for a successor collective-bargaining agreement.[1]

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith with the Union and by unilaterally implementing various bargaining proposals in the absence of a lawful impasse. We agree with the judge's finding that the Respondent violated Section 8(a)(5) by prematurely declaring impasse on November 19, 1990, and by instituting changes on that date. However, we reverse his finding that the Respondent engaged in bad-faith bargaining between October 16 and November 19, 1990, and between January 15 and June 5, 1991.

The Respondent is located in Henderson, North Carolina, where it is primarily engaged in the manufacture of padding for automobile carpets. The Union has represented the Respondent's employees since 1939 and has been party to a series of collective-bargaining agreements with the Respondent since that time, the most recent of which expired on November 19, 1990.

Negotiations for a new contract commenced on October 16, 1990.[3] Prior to the contract's November 19 expiration, three additional bargaining sessions were held, including one on November 19. At the November 19 meeting the Respondent presented a ''last, best and final offer'' and told the Union that if it was not accepted it would be implemented at midnight. The offer was not accepted, and the Respondent, declaring impasse, implemented it as promised.

On December 5 the Union filed an unfair labor practice charge, alleging that the Respondent failed to bargain in good faith. After being notified by the Board's Regional Office that it intended to issue a complaint, the Respondent commenced settlement discussions with Regional Office personnel. Thereafter, the Respondent informed the Union by letter dated January 11, 1991, that ''we are withdrawing our implementation of our last, best and final offer'' and that the expired contractual terms would be reinstated. The Respondent further stated that although ''health insurance is being reinstated,'' it would be with a different carrier, which would provide ''identical'' or ''better'' coverage than that provided under the expired contract. The Respondent assured the Union that any employees who may have incurred medical expenses during the hiatus would be reimbursed.

With the status quo restored, the parties returned to the bargaining table on January 15, 1991. On January 18, 1991, the Regional Director issued a complaint, alleging, inter alia, that the Respondent had bargained in bad faith between October and January. Nine more bargaining sessions were held from February 7 to April 26, 1991, ending again with the Respondent's presentation of a final contract offer, which the Union ultimately rejected. During this time, the Respondent continued to pursue settlement discussions with the Region. On May 6, 1991, the Regional Director notified the Respondent that in light of a new charge alleging the Respondent's refusal to bargain in good faith since January 15, 1991, the Respondent's proposed settlement of the January 18, 1991 complaint allegations would not be approved.

On June 1, 1991, the Respondent implemented the final offer which was submitted to the Union in April. One final bargaining session was held on June 5, but nothing was resolved. A consolidated complaint issued thereafter encompassing all the Respondent's bargaining conduct since October.

The judge found that throughout the entire period of negotiations from October to June the Respondent bargained from a ''pre-conceived agenda, which it knew the Union would not agree to [and] hurried as fast as possible to achieve 'impasse' in order to implement its agenda, bypassing altogether any meaningful attempt at bargaining.'' Specifically, he found that certain of the Respondent's initial proposals were ''predictably unacceptable'' to the Union and that the Respondent rigidly adhered to these proposals in negotiations through November 19, the last day of the contract. Thus, when the Respondent implemented its final offer at midnight on November 19, the judge found that ''it did so without there being a true impasse with the Union and, further,

[1] On July 8, 1992, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel filed a motion to strike an affidavit given by Robert A. Valois, which was attached to the Respondent's exceptions, on grounds that the affidavit constitutes evidence outside the record in this case. We find merit in the General Counsel's contentions, and we grant the General Counsel's motion to strike. *California Distribution Centers*, 308 NLRB 64 fn. 3 (1992).

[3] All dates hereafter are in 1990 unless otherwise indicated.

after a course of bad faith bargaining.'' The judge further found that after the Respondent withdrew its unlawfully implemented contract proposals and resumed negotiations on January 15, 1991, it bargained in bad faith again by unilaterally instituting a new and different health insurance plan without bargaining with the Union, and by ''tailor[ing] its proposals and tactics to create a facade of good faith bargaining'' and renewing its ''push to achieve impasse.''

For the reasons stated below, we find, in agreement with the judge, that the parties were not at impasse on November 19 and that the Respondent's November 19 unilateral implementation of its contract proposals violated Section 8(a)(5) and (1). Contrary to the judge, however, we find that the Respondent's subsequent conduct in negotiations from January 15 to June 1, 1991, did not violate the duty to bargain in good faith, that the parties were at impasse on June 1, 1991, and that therefore the Respondent's June 1, 1991 unilateral implementation of its contractual proposals did not violate Section 8(a)(5) and (1).

1. October 16—November 19 negotiations

As stated above, the parties held their first negotiation session on October 16, with each exchanging a comprehensive set of bargaining proposals that called for changes in the current contract. The Union's proposals included, inter alia, a ''substantial'' but unspecified wage increase, the addition of two holidays, an improved vacation eligibility schedule, daily overtime for work in excess of 8 hours, dependent coverage under the health insurance plan, extension of the grievance filing deadline by 3 days, a reduction of the probationary period for new employees from 45 to 30 days, and the addition of the local union as named party to the contract. The Respondent proposed the elimination of dues checkoff, ''successors'' as a party to the contract, paid grievance processing time for union stewards, superseniority for union officials for purposes of layoff and recall, health insurance, payments to the pension plan, and arbitration. The Respondent also proposed a wage freeze, new holiday pay eligibility requirements, and the addition of language to the seniority clause providing for shift assignments to be made without regard to seniority, the termination of seniority if a layoff lasts longer than an employee's length of service (or 12 months as provided in the contract), and that ability and skill shall be considered along with seniority in job posting-bidding, with the provision that ''ability and skill will be determined in the sole discretion of the company.''

After the Union expressed its strong objection to the Respondent's proposals, the meeting adjourned with an agreement to meet again on October 23.

At the October 23 session, the Union countered the Respondent's proposals with additional proposals, such as the elimination of the management-rights and the no-strike clause. However, the main theme of discussion at this and the next meeting on November 1 centered on the Respondent's proposals, particularly its reasons for wanting to eliminate dues checkoff and arbitration. At the November 1 meeting the Union stated that it would not sign a contract that did not provide for arbitration. When the Respondent replied that it would concede arbitration only if its remaining proposals were accepted, the Union adjourned the meeting, stating that it was going to file unfair labor practice charges and refusing to agree to another meeting until the Board resolved the charge.

The Union later changed its position about cutting off further talks and, with the help of the Federal Mediation and Conciliation Service (FMCS), set another meeting for November 19. To prepare for that meeting, the Union requested by letter certain information from the Respondent pertaining to the contractual pension and health insurance plans.

The parties met as planned on November 19 in the presence of an FMCS mediator. The Union opened the meeting by disputing the claim made by the Respondent in a letter following the November 1 session that the parties were at impasse, and stated that it was ready to continue bargaining concerning all issues. The parties then reviewed the Respondent's pending proposals. After this review, the Union presented a counterproposal, contingent on the retention of arbitration, that contained several concessions involving the withdrawal of some of its own proposals and agreement to some of the Respondent's. The Union further proposed that the contract be extended on a day-to-day basis so that it could analyze the health insurance and pension information, which the Respondent furnished at the beginning of the meeting.

The Respondent rejected the Union's counterproposals, reminded the Union that the contract expired that night, and then presented its ''last, best and final offer'' which it said would be implemented at midnight. The Respondent further rebuffed the Union's request for a contract extension.

At midnight on November 19 the Respondent implemented its final offer. At the Union's request, the parties met again on December 4, but no agreement was reached.

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979). ''Both parties must believe that they are at the end of their rope.'' *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).[4] Applying these principles here, we find no basis for concluding

[4] See generally *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

that the parties were at impasse on November 19. The November 19 meeting constituted only the fourth negotiating meeting between the parties. Unlike the prior meetings, which never got beyond a discussion of the reasons behind the Respondent's desire to eliminate the dues-checkoff and arbitration provisions of the contract, the meeting of November 19 constituted the first real indication that some progress toward agreement was taking shape. The Union's counterproposal on this date, containing a number of concessions, was a sign that the Union was willing to modify its proposals. Given this movement by the Union, the Respondent was not justified in concluding that negotiations were at impasse simply because the Union's concessions were not more comprehensive or sufficiently generous. *Old Man's Home*, 265 NLRB 1632 (1982); and *Cal-Pacific Furniture*, 228 NLRB 1337 (1977). The Union did not say that no further concessions could be expected. Further, the Respondent's declaration of impasse prevented the Union from having the opportunity to evaluate the health insurance and pension information it had just received that day from the Respondent, thereby precluding the possibility that the Union might have made further movement on those subjects at a subsequent session. Under these circumstances, we agree with the judge that there was not a genuine impasse on November 19 and that by subsequently implementing its proposals the Respondent violated Section 8(a)(5) and (1) of the Act.[5]

2. January 15—June 1 negotiations

As stated above, the parties returned to the bargaining table on January 15, 1991,[6] after the Respondent restored the status quo that existed prior to the unlawfully implemented proposals of November 19, 1990.[7] Between January 15 and April 10 the parties held seven more negotiating sessions.

At the January 15 session the Respondent attempted to summarize each side's outstanding bargaining proposals carried over from the October—November negotiations and the position of both parties with respect to those proposals. Discussions in this regard continued at the next meeting held on February 7. On February 8 the Union presented a proposal but cautioned that it was ''conditional on the grounds that the Company is willing to make major concessions in the areas you proposed to destroy this membership and union.'' Specifically, in addition to keeping arbitration which the Union continued to maintain was essential to achieving a new contract, the Union identified wages, health insurance, pension, checkoff, and superseniority as the five areas in which the Respondent had to make major concessions if meaningful bargaining was to occur. Over the course of the next four bargaining sessions the Respondent withdrew its proposals to eliminate arbitration, checkoff, and superseniority. In addition, on ''non-major'' items the Respondent withdrew its proposal that ability and skill be determined ''in the sole discretion of the Company'' for job posting-bidding purposes, withdrew its proposal to eliminate paid time off for stewards in settling grievances, agreed to the Union's proposals to shorten the probationary period, and that seniority not be a factor in shift assignments, and modified its proposals linking layoff to the termination of seniority by agreeing to ''grandfather'' existing employees from its proposal to terminate seniority for layoffs where length of service is less than 12 months.

On April 10 the Respondent submitted a ''last, best and final offer,'' which incorporated the parties' agreement on the foregoing subjects. The Union replied that the proposal was inadequate because it still sought to freeze wages and to eliminate health insurance and pensions. Although the parties met two more times on

[5] We do not agree with the judge's finding that Respondent bargained in bad faith from October 16 through November 19. The judge's findings are based essentially on the content of the Respondent's proposals. The judge said that they were ''predictably unacceptable.'' In our view, the proposals were an aspect of hard bargaining, and such conduct, standing alone, does not constitute bad-faith bargaining. See *Reichhold Chemicals*, 288 NLRB 69 (1988).

[6] All dates hereafter are in 1991 unless otherwise indicated.

[7] The judge found that the status quo was not fully restored with respect to health insurance because the Respondent contracted with a different insurance carrier which he found provided benefits inferior to those provided by the insurance carrier which administered benefits during the term of the expired contract. Having acted unilaterally in doing so, in combination with diminished benefit coverage, the judge found that the Respondent separately violated Sec. 8(a)(5) and (1). We disagree.

As the judge notes in fn. 6 of his decision, the unilateral change in health insurance plans was not alleged in the complaint. Nor do we find that the Respondent was otherwise put on notice prior to or during the hearing that this conduct might be the basis of a violation. Even after the hearing the General Counsel did not argue in its brief to the judge that this conduct violated the Act.

Furthermore, we note that the General Counsel's failure to plead in the consolidated complaint or litigate at trial the change in health insurance was not inadvertent. In correspondence to the General Counsel prior to the issuance of the consolidated complaint, the Union urged this conduct as a violation. Nevertheless, the ''General Counsel chose not to issue a complaint . . . and we are unwilling to circumvent his authority by basing an unlawful [unilateral change] finding upon a record which does not specifically address this issue.'' *Florida Steel Corp*., 224 NLRB 45 fn. 2 (1976). See also *Union-Tribune Publishing Co*., 307 NLRB 25 at fn. 2 (1992); *Electrical Workers IBEW Local 1186*, 264 NLRB 712 fn. 3 (1982).

Accordingly, because the change in health insurance plans was neither alleged in the complaint nor litigated at the hearing, we reverse the judge's finding of violation in this respect. We further find, in the absence of other evidence to the contrary, that the Respondent fully restored the status quo prior to returning to the bargaining table on January 15.

April 25 and 26, neither party presented any new proposals on these subjects and no new agreements were reached. The Respondent unilaterally implemented its final offer on June 1.

On these facts, and ''scrutiniz[ing the Respondent's] overall conduct,''[8] we do not agree with the judge that the Respondent has demonstrated the kind of intransigence and insistence on its own proposals which evidences bad faith. After the parties reconvened on January 15 for the second round of negotiations, the Respondent made a number of significant concessions in areas of great concern to the Union which, rather than evincing an unlawful take-it-or-leave-it bargaining stance as found by the judge, was more demonstrative of a flexible good-faith approach to bargaining. Thus, it withdrew its proposal to eliminate arbitration, thereby capitulating on what the Union described as the ''key issue that had to be resolved'' as a prerequisite to subsequent meaningful bargaining. The Respondent made concessions on other subjects as well, including the union-designated ''major'' items of checkoff and superseniority. In addition, to the Union's satisfaction, the Respondent either withdrew or modified other proposals regarding probation, seniority, job posting-bidding, and steward pay for time spent in grievance settlement. As the judge himself acknowledged, ''significant substantive bargaining'' was developing during the January—June negotiations.

When negotiations finally broke down following the Respondent's April 10 submission of its ''last best and final offer,'' only three of the major items designated by the Union remained unresolved: wages, health insurance, and pensions. Although the Respondent was unwilling to agree to the Union's demands on these three subjects, its ''failure to make these concessions to the Union [does not constitute] a sufficient manifestation of intent to avoid agreement.'' *88 Transit Lines*, 300 NLRB 177, 179 (1990).[9] As stated in *Challenge-Cook Bros.*, 288 NLRB 387, 389 (1988), ''a party may stand firm by a bargaining proposal legitimately proffered.'' Here, the record showed that the parties took firm positions regarding wages, health insurance, and pensions from which neither was willing to budge. Under these circumstances, we cannot conclude that by maintaining and adhering to its position on these subjects the Respondent violated the Act. *Chevron Chemical Co.*, 261 NLRB 44 (1982).

We further find that the parties were at impasse on June 1 when the Respondent implemented its final offer. As stated above, the Respondent submitted a final offer on April 10, but the Union rejected it because it failed to provide for a wage increase and to maintain the pension and health insurance plan. The Respondent made clear from the outset of negotiations that economic relief in the form of a wage freeze and the elimination of pension and health insurance was of immediate, central, and overriding concern to it. However, equally clear throughout negotiations was the fact that the concessions sought on these subjects were totally unacceptable to the Union. Between the Respondent's submission to the Union of its final offer and its implementation, neither party made any movement in these critical areas, suggesting that the parties were deadlocked and that further bargaining would have been futile. Therefore, we find that on June 1 when the Respondent implemented its final offer a valid impasse existed and that the implementation of the final offer was lawful. *Bloomsburg Craftsmen*, 276 NLRB 400, 404 (1985). Accordingly, we shall dismiss this aspect of the complaint.

[8] *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

[9] This case is distinguishable from *American Meat Packing Corp.*, 301 NLRB 835 (1991), where, unlike here, the respondent manifested no real intent to adjust differences, but essentially adopted an unlawful ''take-it-or-leave-it'' approach.

ORDER

The National Labor Relations Board orders that the Respondent, Larsdale, Inc. (Burkart Carolina), Hendersonville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing unit employees' terms and conditions of employment on November 19, 1990, without bargaining with the Union to either an agreement or impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) To the extent that it has not already done so, make whole unit employees Jeannie Jackson and John Leonard for any loss of pay they may have suffered as a result of their unlawful layoff following the unilateral elimination on November 19, 1990, of the contractual superseniority clause; and make whole unit employees for the losses they may incurred commencing on December 31, 1990, when the contractual health insurance plan was eliminated, until about January 14, 1991, when the Respondent restored health insurance coverage, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Henderson, North Carolina facility copies of the attached notice marked ''Appendix.''[10] Copies of the notices, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change the terms and conditions of employment of bargaining unit employees without bargaining with the Union to either an agreement or impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, to the extent that we have not already done so, make whole unit employees Jeannie Jackson and John Leonard for any loss of pay they may have suffered as a result of the unlawful discrimination against them, with interest.

WE WILL, make whole unit employees for the losses they may have incurred commencing on December 31, 1990, when the contractual health insurance plan was eliminated, until January 14, 1991, when health insurance coverage was restored, with interest.

LARSDALE, INC. (BURKART CAROLINA)

Donald R. Gattalaro, Esq., for the General Counsel.
Guy F. Driver Jr. (Wombley, Carlyle, Sandridge and Rice), of Winston-Salem, North Carolina, for the Respondent.
Louise P. Zanor, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on October 9–11, 15, and 16, 1991, in Raleigh, North Carolina. The charges which gave rise to this case were filed by the International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local Union 265FW (the Union) on December 5, 1990, and May 6, 1991, against Larsdale, Inc. (Burkart Carolina) (Respondent). On June 21, 1991, an order consolidating cases, consolidated complaint, and notice of hearing issued.

The consolidated complaint alleges that Respondent negotiated with the Union in bad faith with no intent to enter a final and binding collective-bargaining agreement; bypassed the Union and dealt directly with employees; unilaterally and without prior notice to, or consultation with the Union, ceased contributions to employee health insurance and pension plans; unilaterally discontinued the employees' seniority plan, including superseniority for union officials; laid off employees Jeannie Jackson and John Leonard as a result of the unilateral discontinuance of the seniority plan; and, after restoring contributions to the employee health and pension plans, again proposed that these contributions be eliminated, and thereafter unilaterally eliminated such contributions.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; the history of collective bargaining between Respondent and the Union prior to the events described in the complaint; and the status of certain individuals as supervisors and/or agents of the Respondent within the meaning of Section 2(2), (11), and (13) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial here, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, all parties filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Burkart Carolina is a division of Larsdale, Inc., a Delaware corporation. The Burkart Carolina facility is

located in Henderson, North Carolina, where it is engaged primarily in the manufacture of padding for automobile carpets. In the course of its business operations Respondent annually receives at its Henderson facility materials and supplies valued in excess of $50,000 directly from points outside the State of North Carolina. In addition, Respondent annually ships from its Henderson facility products valued in excess of $50,000, directly to points outside the State of North Carolina.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local Union 265FW is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

At its facility in Henderson, North Carolina, Respondent primarily manufactures padding for automobile carpets. Respondent also manufactures copper wire which it supplies to various customers, including Gilbert Manufacturing Company, a privately held corporation owned by the same principal who owns Respondent. The Union has been the exclusive collective-bargaining representative of Respondent's employees since 1939. This long history of bargaining has included a series of collective-bargaining agreements, the most recent of which commenced on August 1, 1987, and was effective until November 19, 1990.

On August 21, 1990, the Union served notice on Respondent, with a copy to Federal Mediation and Conciliation Service (FMCS), of its desire to renegotiate the collective-bargaining agreement.

1. October 16, 1990: negotiation session 1

On October 16, 1990, the parties held their first negotiating session, during which they exchanged contract proposals. The Union was represented by Elmer Moyer, an International union representative, and by a local negotiating committee. Respondent was represented by Attorney Margie Case and Plant Manager Larry West. A brief summary of the respective contract proposals is in order as a backdrop to their further actions.

Briefly, the Union proposed adding Local 265FW as a party to the agreement; extending the time for filing of grievances by employees; reducing the probationary period for new employees from 45 to 30 days; extending from 12 months to 36 months the length of layoff after which seniority is terminated; and extending the period of illness or injury from 12 months to 36 months after which seniority is terminated. The Union also proposed various improvements in retention and bumping privileges for regular employees in case of layoff; various improvements in job posting and job bidding; and improvements in both holidays and vacations. The Union proposed overtime pay for work in excess of 8 hours per day and for Saturdays. The Union also proposed that Respondent pay the full cost of group insurance, including dependent coverage, as it had prior to the 1987 agreement. Finally, the Union proposed a ''substantial'' wage increase each year of the new agreement.

Respondent proposed deleting ''successors'' as a party to the agreement and changing the nondiscrimination clause to read simply, ''The Union and the Company will observe the legal rights of all employees.'' Respondent proposed eliminating union dues checkoff and eliminating paid time off for union grievance committee persons for time spent on grievance settlements. Respondent proposed eliminating arbitration altogether and substituting language providing, ''The decision of the Industrial Relations Representative shall be final and binding.'' Respondent proposed reducing the length of layoff after which seniority is terminated from 12 months to ''12 months or the employee's length of service, whichever is less.'' Concerning job posting and bidding, Respondent proposed that jobs be awarded on the basis of ability and skill, adding, ''Ability and skill will be determined in the sole discretion of the Company.'' Respondent proposed reducing pay for employees temporarily promoted to another job from the higher rate for the entire day to only time worked in the temporary job. Respondent proposed eliminating superseniority for all union officials for purposes of layoff and recall. Concerning shift assignments, Respondent proposed that it never be required to assign shifts by seniority. Respondent proposed eliminating the Union's ability to challenge a pay rate established by Respondent in a new or changed job. Last, and certainly not least, Respondent proposed eliminating both health insurance and its pension plan. Concerning the pension plan, Respondent proposed, ''As of November 19, 1990, the Company shall cease making contributions to the pension plan; no additional service credits shall be given; and the plan shall be frozen.''

After the parties took a break to review each other's proposals, the parties reconvened. The Union objected to Respondent's proposals as attempting to ''gut the contract, to basically eliminate our ability to function as a local union.'' The Union pointed out that Respondent was proposing things that they knew the Union could not accept and accused Respondent of trying to roll the clock back to 1940. The meeting adjourned shortly thereafter.

2. October 23, 1990: negotiation session 2

When the parties held their second meeting, on October 23, 1990, Attorney Margie Case, Respondent's primary spokesperson, presented the Union with a copy of the Union's initial proposal with various sections highlighted to show that many of the revisions proposed by the Union were designed to reinstate provisions which had been in effect prior to the 1987 agreement. Case explained that she did this to counter the Union's complaint that Respondent's initial proposal was intended to turn the clock back to 1940. Case argued it was the Union who was trying to turn the clock back.

In the 1987–1990 agreement, the Union had granted numerous concessions, including wage cuts and employee payments for health insurance premiums for dependent coverage. It is undisputed that when the Union agreed to the 1987–1990 collective-bargaining agreement, Respondent told the Union that the Company would agree to restore these concessions if it continued to operate and prosper. There is no

question that the Union's proposal attempted to restore the 1987 concessions.

Case also distributed two newspaper articles headlined: ''Economists Are Getting Downright Pessimistic'' and ''Financial Outlook Scary, But There Might Be Places To Hide.'' After distributing the articles, Case explained Respondent's demand for eliminating health insurance and pensions stating, ''A prudent man in times like these wants to make more money. We want to batten down the hatches. We want to decrease expenses so we can make more money in the face of financial forecasts.'' Case then verbally presented Respondent's proposals.

When Case was finished, the Union stated that it could not agree to Respondent's proposals to eliminate arbitration, superseniority, or union dues checkoff. The Union challenged Case to explain why Respondent proposed to eliminate dues checkoff. Case replied that employees should have ''freedom.'' The Union replied that North Carolina is a right-to-work State and that employees already had complete freedom to choose whether to be union members.

The Union distributed a page of additional proposals ''To combat some of the proposals that the Company was making . . . .'' These additional proposals called for deleting the entire management-rights clause, awarding jobs solely on the basis of seniority, prohibiting nonunit employees from performing bargaining unit work, deleting the no-strike clause, and instituting cost-of-living adjustments. Each party rejected the other's proposals in their entirety.

3. November 1, 1990: negotiation session 3

The third negotiation session began by Respondent noting that it had permanently laid off three management employees: a sales manager, a purchasing agent, and a maintenance supervisor. This was in response to comments at the previous meeting by the Union that Respondent expected only bargaining unit employees to take cuts, and that Respondent never took anything away from management. By the time of this meeting, there were only about 50 hourly employees working, approximately half of what the work force had been only a few months before. In fact, the maintenance supervisor had been scheduled to retire soon and the sales manager had 45 years' tenure with Respondent. Thus, at least two, if not all three management employees allegedly laid off were eligible to draw retirement.

Case next proposed to modify Respondent's original proposal that in order to get holiday pay, an employee must work the day after the holiday. In response to a pending grievance, Respondent modified this proposal and also retreated from the position of not permitting holiday pay in the event of vacation occurring prior to the holiday. As modified, however, Respondent still proposed eligibility requirements that were not present under the 1987–1990 agreement.

The Union again challenged Respondent to explain its proposal to eliminate dues checkoff. Case again replied that checkoff was a question of ''freedom'' and added that there was also a cost factor involved. The Union responded by requesting information concerning the cost of providing dues-checkoff services to the Union.[1]

[1] Respondent later provided information which showed that dues-checkoff services cost Respondent approximately $6 per year.

The Union then asked Respondent to explain its reason for eliminating arbitration from the grievance procedure. Case responded by stating that because the parties had a good record for settling grievances, arbitration was unnecessary. The Union responded that the settlement rate was substantial precisely because arbitration acted as a deterrent to both parties and promoted settlements. The Union also countered that a contract without arbitration would be meaningless and unenforceable and that Respondent was committing an unfair labor practice by proposing the elimination of arbitration while maintaining the no-strike clause in the expired contract. The Union stated that it would file unfair labor practice charges with the Board regarding that proposal. At the hearing here, Union Negotiator Robinson conceded that at the November 1 meeting, he took the position that arbitration had to be disposed of before he would bargain on other issues.

After the parties caucused, Case asked the Union if it would accept all Respondent's other proposals if Respondent agreed to rescind its elimination of arbitration. The Union replied that it would not agree to everything else, but that it would be willing to negotiate the other issues. Case, however, made it a point to state that she ''wanted to go on record'' as having made such an offer. The Union told Respondent that it would also be filing unfair labor practice charges over its unwillingness to concede on the arbitration issue only if the Union would accept all the rest of Respondent's proposals. Case then asked the Union if it wanted to set another meeting date. It is undisputed that the Union refused to schedule another meeting date, stating it would ''prefer'' to wait clarification from the Board.

Events Between November 1 and the Next Negotiation Session on November 19

On November 2, 1990, Case wrote to the Union reciting her version of the meeting the previous day. The letter concludes:

> In view of the parties' impasse caused by your refusal to discuss other issues until the Company concedes the arbitration issue, you are hereby notified that on November 19, 1990, at the expiration of the current contract, the Company will implement its offer which is now on the table.

On November 5, 1990, the Union filed an unfair labor practice charge against Respondent with the Board.

On November 7, 1990, Respondent posted a notice to its employees which stated its proposal to freeze the existing pension plan.

In response to Respondent's letter of November 2, the Union contacted FMCS requesting help in scheduling another meeting. FMCS, in turn, contacted Respondent. On November 14, 1990, Respondent sent a letter to the Union agreeing to a meeting suggested by FMCS on November 19. In that same letter, Respondent stated:

> If the current situation remains unchanged, the Company still plans to implement its proposal at the expiration of the present contract, with two exceptions. . . . First . . . the Company would extend the insurance plan to the end of the year, instead of ending it on No-

> vember 19. Second . . . the pension plan freeze would occur at the end of the month of November rather than on the 19th.

The letter also informed the Union that Respondent had published for its employees a document entitled ''Notice Of Cessation Of Future Benefits Accruals Under the Burkart Carolina Hourly Pension Plan.'' In this notice to employees, also posted on November 14, Respondent informed employees, ''You are hereby notified that Burkart Carolina has given notice to the Furniture Workers Division, IUE that on November 19, 1990, the Company will implement the proposal for a new contract that the Company has proposed to the Union in negotiation.''

On the following day, November 15, the Union wrote to Respondent disputing Case's account of the November 1 bargaining session and stating that it was Respondent, not the Union, that had bargained in bad faith. The letter also stated, ''the Union wished to emphasize that the parties had not reached impasse'' and ''any attempt by the Company to implement its proposals would constitute an additional unfair labor practice.'' That same day the Union also requested detailed information regarding Respondent's group insurance and pension programs.

4. November 19, 1990: negotiation session 4

On November 19, the parties met under the auspices of FMCS. After opening remarks by FMCS Mediator Bradley, the Union expressed its position that the parties were not at impasse. The Union stated that it was ready to meet and bargain concerning all issues. Case responded by noting that at the last meeting, the Union had said that the issue of arbitration was the key issue which had to be resolved first. The Union responded by stating that it would request withdrawal of the unfair labor practice charge relating to Respondent's proposal to eliminate arbitration. It then stated that there were many issues separating the parties, including arbitration, dues checkoff, seniority, pension, and insurance.

Case reiterated to FMCS Mediator Bradley the same reasons it had given the Union for wanting to eliminate pensions and insurance—that Respondent wanted to be ''prudent'' and wanted to ''batten down the hatches.'' Bradley asked the parties to caucus separately. Before adjourning, Case hand-delivered documents responding to the Union's request for information. The Union asked Case if all the requested information had been provided, and Case said it had.[2] The parties then adjourned.

When FMCS Mediator Bradley met separately with the Union, Bradley stated he saw no chance of the parties reaching agreement because Respondent had told him it was unlikely they would agree to the union proposals or that Respondent would change any of its proposals. After Bradley met separately with each of the parties, a joint meeting reconvened. The Union then asked Respondent to review its proposals and explain the reasons behind them. Case objected, stating that she had already done this in previous meetings. The parties, however, proceeded to discuss employer proposals.

[2] On reviewing the information, the Union determined that it was actually not complete. After pointing this out to Respondent, Respondent provided additional information that same day.

Concerning checkoff, the Union offered to bear the cost of checkoff ($6.20 per year) if the Employer would agree to keep it in the contract. Case responded that cost was not a reason for Respondent's proposal concerning checkoff, insisting instead that employee ''freedom'' was the sole reason for its proposal. Regarding the elimination of pensions and insurance, Case again cited ''prudence'' as the reason for Respondent's position.

The Union then proposed certain concessions if Respondent would agree to leave arbitration as it was in the existing contract. More particularly, the Union offered to withdraw its proposal to shorten the probationary period, to withdraw its proposal to make the local union a party to the contract, to withdraw its proposal to extend the time for filing grievances, to agree to Respondent's proposal to eliminate the ''successor clause,'' and to agree to Respondent's proposal to terminate seniority after a layoff of 12 months or the employee's length of service, whichever is less. In conjunction with this proposal, the Union also proposed extending the existing contract on a day-to-day basis while the Union analyzed the insurance information it had just been given, and to give it time to formulate a response.

In response to this proposal, Respondent responded by noting that the contract expired at midnight that night and asked if an analysis of the information provided concerning pensions and insurance would permit the Union to agree to Respondent's proposal. The Union, of course, had to admit that it did not know of anything which might permit it to agree to Respondent's proposal to eliminate insurance and pensions altogether. Respondent stated then that it was prepared to give the Union its ''last, best and final offer'' which it would implement at midnight that night. Respondent's offer was a reiteration of its original offer with the following modifications: to drop its proposal to remove successorship language from the contract; to drop its proposal eliminating arbitration; to eliminate the pension provision at the end of that month rather than immediately; and to eliminate insurance at the end of the year rather than immediately. Respondent also refused to extend the existing agreement and again notified the Union that it would implement its final offer at midnight that night.

The Union again asked that the existing agreement be extended on a day-to-day basis in order to allow union members to vote on Respondent's proposal. Respondent again refused.

Midnight November 19, 1990: Expiration of Existing Agreement and Implementation of Respondent's ''Final Offer''

At midnight on November 19, the parties' existing collective-bargaining agreement expired.

At that same time, Respondent unilaterally implemented its ''final offer.'' In so doing, Respondent unilaterally eliminated pension payments and health insurance as proposed in the final offer, eliminated union dues checkoff and superseniority for union officials, and reduced pay for employees temporarily promoted to another job.

5. Events up to and including negotiation session 5

On November 20, the Union held a meeting with its members during which they voted to reject Respondent's final

offer. They also voted not to initiate strike action but to send negotiators back to the bargaining table to try to reach an agreement with Respondent.

In a letter dated November 21, Case wrote to the Union:

> The subject matter of items in the Company's last, best and final offer had been proposed to the Union as early as October 16, 1990, and the Union had ample opportunities to discuss these terms at all previous bargaining sessions. Despite this fact, the Union never offered an acceptable counterproposal, but instead engaged in obstreperous and dilatory tactics designed to prevent the Company from having the benefit of its proposals. . . . We are . . . operating under the terms of the implemented proposal and not the terminated ''old contract.'' We anticipate that there will be another layoff no later than December 5, 1990. We further anticipate that the extent of the layoff will be such as to include most of the Union negotiating committee.

Although in the letter dated November 21, Case expressed Respondent's position that it believed ''further negotiations would be futile,'' the Union requested another meeting. Respondent agreed, and the parties held their fifth meeting on December 4, 1990. FMCS was not present. The Union stated that it wanted to achieve a contract and that after analyzing the information received from Respondent, the Union had formulated a contract proposal regarding insurance. Case, however, asked the Union for a ''complete proposal.'' The Union in turn asked Case if she had the authority to change Respondent's offer. Case avoided a direct response, stating instead that she had the authority to consider the Union's proposal. Case stated that the Union had Respondent's last, best and final offer, but that she would consider ''a complete proposal'' from the Union. Case then stated: ''Maybe it will be better; maybe you will offer that the Union pay for insurance and take a $2 per hour wage cut—how do I know? I will look at a complete proposal.''

After continued bantering between Case and the Union, the Union questioned Respondent's position on checkoff. Case again stated that it was ''a matter of freedom.'' The Union argued that the freedom explanation was facetious. The Union noted that Gilbert Manufacturing in New York City, a corporation owned by the same parent corporation that owns Respondent, had checkoff in its current collective-bargaining agreement. Case did not dispute this fact. Instead, she simply said she was not bargaining for Gilbert. The Union again asked that dues checkoff be reinstated. The Union also made a proposal under which it would have administered a group insurance plan. At the same time, the Union told Respondent it would decrease its proposal for a wage increase. Lastly, the Union noted that this did not necessarily represent its bottom line.

Respondent rejected the Union's revised proposal. At the conclusion of the meeting, the Union stated that it wanted to see Respondent's financial report. Case refused to give the Union the report. The Union responded, ''You said you need to make more money.'' Case replied, ''I didn't say 'need.' I said 'desire.'''

December 1, 1990, to January 15, 1991: Filing of Unfair Labor Practice Charge and Exchange of Correspondence

On December 5, the Union filed the unfair labor practice charge in Case 11–CA–14169 alleging that Respondent had failed and refused to bargain and had engaged in surface bargaining.

Also on December 5, Union Stewards and Committee Persons Jeannie Jackson and John Leonard, who would otherwise had superseniority under the terms of the expired collective-bargaining agreement, were laid off as Respondent had predicted.

On the following day, December 6, the Union sent Case a certified letter acknowledging receipt of her faxed letter of December 5. In that same letter, the Union denied that the parties had reached impasse.

On December 13, Case again wrote to the Union expressing its position that the parties remained at impasse. Case once again stated that she would consider any offer made by the Union because the Union might offer a proposal more favorable to Respondent than Respondent's own ''last, best and final offer.''

Some time prior to January 11, Case was contacted by NLRB Region 11 Field Examiner Gary Stiffler and informed that the Regional Director had decided to issue a complaint in Case 11–CA–14169. Case and Stiffler discussed settlement. According to Case, Stiffler told her that settlement would require withdrawing the implementation of Respondent's final offer, reinstatement of the insurance, pension plan, union-dues checkoff, and superseniority. Stiffler also told Case that a settlement would require Respondent to reimburse employees for any medical expenses incurred after Respondent terminated medical insurance coverage.

On January 11, 1991, Case wrote to the Union:

> Until a final decision or resolution of the Union's charges with the NLRB is reached, or until the parties either enter a collective bargaining agreement or reach impasse, we are withdrawing our implementation of our last, best and final offer. This means that the contract still has expired, but the implemented terms are no longer in effect.

On January 14, Region 11 Field Examiner Stiffler sent Case a letter attaching a proposed settlement agreement and ''Notice to Employees.''

6. January 15, 1991: negotiation session 6

On January 15, the parties met again under the auspices of FMCS. Union Representative Elmer Moyer had been transferred and, from this meeting on, would no longer represent the Union in these negotiations. Instead, International Representatives Lowell Daily and Willis Robinson represented the Union. Daily admitted that during the prior meeting the Union had stated it would need time to consult with actuaries to review the information provided by Respondent in order to make a complete proposal regarding insurance. Daily stated that he had not had the opportunity to review certain documents produced by the Company in response to the Union's request for information until the night before this meeting. Daily began to ask for additional information from Respondent. Case asked whether the documents

that he was now requesting would prevent the Union from making a complete proposal. Daily responded that he was ready to negotiate on any issue to be bargained. Case again asked the Union for a complete proposal. The Union responded that it did not have to give its proposal in complete contract form, and that it was ready to detail a possible proposal for offering insurance and pension programs administered by the Union.

Case asked Daily to go through the original union proposals item by item in order to clarify the status of those proposals. Daily accused Case of wanting to reach impasse. Daily stated he was unfamiliar with the status of all union proposals because he had not talked to Moyer about each of them. Case repeatedly asked if Moyer could be contacted immediately by telephone in order to ascertain the Union's position. When Daily stated he did not know if he would get in touch with Moyer, Case continued to press for the Union's proposals. Daily said he would ''research'' them and determine the content of the Union's proposals.

Case then told Daily that because Daily could not or would not describe each of its current proposals, she was going to give Daily a list of what Case thought were the Union's proposals, what were Respondent's positions on each of those proposals, and what each of Respondent's proposals was at the time. During a break, Case prepared a handwritten document setting forth what she thought was the status of every proposal made by either side. Case labeled this ''Company's Response and Counter-Proposal to Union's Proposals.'' In this same document, Case withdrew Respondent's proposal to change the ''non-discrimination'' section of the contract and its proposal to pay only for time worked in cases of temporary promotion.

When the break was over, Case gave this document to the Union. Daily responded that the document was too much to digest in a brief period of time, and suggested they should schedule another meeting. Meeting dates were then set aside for January 22 and 23. However, those meeting dates were later canceled.

January 16 to February 7: Exchange of Correspondence Between all Parties and Issuance of Complaint

On January 16, 1991, Case wrote to NLRB Region 11 Attorney Ron Yost confirming that she and Yost had discussed settlement. Documents which accompanied Case's letter show that a nonadmission clause had been added to the settlement by Case as well as a typed addition to the notice to employees indicating that Respondent had already restored the pension plan, reinstated superseniority and reinstated people who had superseniority, instituted an insurance plan, and agreed to make whole employees affected by cancellation of the insurance plan.

Also on January 16, the same day that Case wrote to NLRB Region 11, Case wrote to the Union asking for a response to her document entitled ''Company's Proposal and Counter Proposal to Union's Proposal.'' In this letter, Case provided the Union for the first time specific information regarding new insurance coverage which it was placing in effect rather than reinstating former insurance coverage. Case informed the Union that coverage would be provided by Lincoln National rather than as formerly provided by Metropolitan. The letter also admits and describes certain differences between the Lincoln National coverage and the Metropolitan coverage, including a requirement of precertification for all planned nonemergency hospital admissions. According to Case's letter, however, this ''distinction does not in any way lessen the coverage or have an economic effect.''

On January 17, Case wrote to the Union enclosing a copy of an unfair labor practice charge which Respondent was filing against the Union.

Also on January 17, the Union responded to Case's letter of January 16. In this response, the Union objects to Respondent's alleged failure to bargain in good faith, reiterates its own position that it is ''willing to bargain on each item,'' reasserts ''we are not at impasse,'' and objects to the changes in insurance coverage between Lincoln National and Metropolitan. In closing, the Union observed that the program description, issued by Lincoln National and faxed to the Union by Case, ''specifically warns that you may incur greater-out-of-pocket expenses as a result of the new requirement.''

On January 18, Region 11 issued a complaint against Respondent in Case 11–CA–14169. Also on January 18, Region 11 Agent Ron Yost wrote to Robert Friedman, the Union's general counsel. Yost forwarded a copy of the proposed settlement and notice, stating that the settlement represents ''that which could be expected should the alleged . . . violations be found meritorious before an administrative law judge of this agency.'' Yost invited Friedman to submit objections and supporting arguments within 7 days if the Union objected to the settlement.

On January 23, 1991, Case wrote to Region 11 asking for a detailed description of the Board's case citations and reasoning in connection with the complaint which had issued on January 18. On that same day, Case received a letter from Daily stating that he had never before seen some of Respondent's proposals in the document dated January 15.[3]

On January 25, Union Counsel Friedman wrote to Region 11 acknowledging receipt of the proposed settlement agreement and voicing objection to it in part based on the Union's position that Respondent was continuing to violate the Act. On that same day, Case wrote to Region 11 in support of Respondent's unfair labor practice charge against the Union.

7. February 7 and 8, 1991: negotiation sessions 7 and 8

On February 7 and 8, the parties met on their own, without FMCS. The February 7 meeting centered primarily around Case's ''Company's Response and Counter Proposal to the Union's Proposal.'' The Union asked whether Respondent's last offer was still on the table. Case said that it was still on the table as described in the January 15 document. Using that document, Case also argued that Respondent had made concessions. The Union countered that any concessions by Respondent were not ''major concessions'' in that they did not deal with wages, insurance, pension, checkoff, or superseniority. The Union told Respondent that if it really wanted to get to serious bargaining, Respondent would need to make some changes in these areas. The Union also raised the fact that the change from Metropolitan to Lincoln National contained changes in coverage as well. Respondent did not directly answer either of these two points, but the meeting ended by the Union stating that it would put to-

[3] Respondent asserts that all these proposals had been on the table ''in some form'' since October 23.

gether another proposal that evening for discussion the following day.

On February 8, the Union presented a proposal which was ''conditional on the grounds that the Company is willing to make major concessions.'' After a break for Respondent to examine the proposal, Case focused discussion on the statement that the proposal was ''conditional.'' Case first asked if all the proposals were conditional. When the Union responded that those marked conditional are conditional, Case asked if the proposal was conditional on ''major concessions'' in every one of the five major areas. Daily responded for the Union, saying:

> We didn't say that. We will have to find out what you are willing to do before we answer that question. If you say that we already have your first and final offer, then we'll go back to our first offer. We want meaningful offers on those items.

Case, however, was not satisfied. Rather than attempt to discuss or negotiate over substantive issues, Case continued to focus on what ''conditional'' meant. Finally, Daily accused Case of ''trying to create another situation.'' Later, after another break, Daily said that the Union might be willing to make even more concessions on some other items, that this was not the Union's ''final final offer.'' There is no indication that Respondent offered any concessions at either the February 7 or 8 meetings.

8. February 13, 1991: negotiation session 9

On February 13, the parties met again. At this meeting, Respondent presented a counterproposal to the Union. Most of this bargaining session was spent describing and explaining this counterproposal.

In the February 13 counterproposal, Respondent proposed revocable union-dues checkoff, to be deducted only when the employee received a paycheck. The prior agreement authorized accruing debt for checkoff when an employee was not receiving a paycheck, such as during a layoff. Respondent withdrew its proposal to give only unpaid time off for union grievance committeemen in the settlement of grievances. Respondent proposed to ''grandfather'' existing employees from the extended probationary period in its earlier proposals. Respondent also proposed to ''grandfather'' existing employees from its proposal to terminate seniority for layoffs where length of service is less than 12 months. Respondent proposed superseniority for two individuals and modified its proposal that seniority not be a factor in shift assignment. The Union asked about the grievance-and-arbitration procedure, and Case said Respondent was proposing, or agreeing, that it remain as it was in the expired agreement.

It appears that Respondent's concession on the inclusion of arbitration was the only item on which agreement was reached at the February 13 meeting.

9. March 6 and 7, 1991: negotiation sessions 10 and 11

On March 6 and 7, the parties again met under the auspices of FMCS. The meeting on March 6 was apparently rather brief. The Union told Respondent that it would not present a counterproposal to Respondent's February 13 proposal because Respondent was not showing enough movement in the five major issues. The Union said it wanted more movement from Respondent. Case replied that she would not bid against herself, that she had made a proposal and she wanted a union counterproposal. Daily does not deny Case's version that he responded to her by saying the Union would ''find a way to change a period somewhere if that is what you want.'' Case told the mediator to tell the Union that Respondent wanted a proposal. The Union said it would prepare a proposal for the next day, and the meeting apparently ended on that note.

On March 7, the Union presented a new proposal emphasizing the ''five major issues'' of wages, insurance, pension, union-dues checkoff, and superseniority. This proposal stated in part:

> We are not making absolute demands and would have further concessions to discuss if the other five (major) points . . . were settled in a mutually agreed fashion. This should not be considered a final final offer by the Union. We are willing to negotiate in good faith on our proposal and we will be flexible.

On the last page of the Union's proposal, the Union again stated, ''We are also flexible once the Company begins to move on the major issues.''

At this same meeting, Respondent presented another counterproposal. Respondent agreed, as it had earlier, to keep the arbitration procedure, but continued to propose elimination of insurance and freezing of its pension program. The proposal also accepted the Union's specific language about the probationary period, withdrew Respondent's proposal to add language that ''ability and skill would be determined in the sole discretion of the Company;'' and proposed to add two more union stewards with superseniority if Respondent were to start a third production shift.

Near the conclusion of the March 7 meeting, the Union notified Respondent that it would be unable to meet on March 12 and 13 as had been tentatively scheduled. The Union told Respondent that it would be unable to meet so that it could comply with an NLRB request for information. Case asserted that this was just a dilatory tactic on the part of the Union. On the following day, March 8, Case faxed Stiffler a letter objecting to the Union's refusal to meet, and included with it a second unfair labor practice charge by Respondent against the Union.

March 8 to April 8, 1991: Exchange of Correspondence

On March 12, 1991, Respondent wrote to the Union and the Union wrote to Respondent, the letters apparently crossing in the mail. In Respondent's letter to the Union, Case agreed to meet on April 9 and 10 as the Union was requesting. Case also asked for earlier dates for meetings and stated that there was really no deadline which would have prohibited the Union from meeting on March 12 and 13 as had originally been scheduled.

In the Union's letter to Respondent, Daily informed Case that Respondent's proposal of March 7 had been taken to the union membership on March 10 and had been rejected. Daily confirmed his availability for meetings on April 9 and 10 and asked that meetings be held in the evening to avoid lost time for employee members of the negotiating committee. Finally, Daily requested proof that the insurance and pension con-

tributions were actually being paid and that Respondent had actually reinstated benefits which had been earlier cut.

In a letter dated March 15, 1991, Case replied to Daily's request for evening meetings. Case stated that the Union committee people had never before expressed any concern about missing work. Case also stated that daytime meetings would serve to have everyone present when they were most efficient, and declined meeting in the evening. Finally, Case stated she would supply the proofs of payment requested by Daily in his March 12 letter.

On March 22, 1991, Case received a letter from NLRB Region 11 Field Examiner Stiffler with an attached list describing differences which the Union noted between the Metropolitan insurance coverage and the Lincoln National coverage. Stiffler also asked for information regarding what discussions, if any, had taken place between Respondent and the Union concerning changes in benefits and any proof which existed that Respondent had reinstated various benefits earlier withdrawn. The letter states that the information ''is requested in order to determine only the level of reinstatement of benefits for settlement purposes of the above styled case.''

On April 5, 1991, Case wrote to Stiffler setting forth Respondent's position on the differences between Metropolitan insurance coverage and that provided by Lincoln National. Case also supplied existing proof that other unilateral changes had been restored. Case's letter also stated that Respondent was willing to sign a NLRB notice telling employees that Respondent would not increase benefits without first discussing the increase with the Union. Finally, Respondent took the position that if any employee were to have treatment under the ''mental illness, substance abuse and alcoholism'' provision of insurance provided by Lincoln National and could thereafter prove that he had suffered a monetary loss as between Lincoln National coverage and Metropolitan coverage, Respondent would pay the difference.

10. April 9 and 10, 1991: negotiation sessions 12 and 13

On April 9 and 10, the parties again met with the Federal mediator present. On April 9, there was little, if any, substantive negotiation. The meeting was spent discussing to what extent Respondent had reinstated the status quo in its effort to settle the outstanding unfair labor practice complaint and whatever proof Respondent had of the actions it claimed to have taken. Respondent also provided the Union with various requested information.

On April 10, the Union presented Respondent with a proposal for a 40-cent-per-hour wage increase each year for 3 years of the contract; for Respondent to provide insurance either through a union-administered plan or by restoring insurance as it existed in the expired agreement; and for Respondent to restore the pension program and increase annual retirement payments. In addition, the Union withdrew some proposals dependent on the Company ''beginning to move on the five major issues.''

Respondent responded by presenting another ''last, best and final offer.'' In this, Respondent proposed restoration of checkoff and superseniority as they had existed in the expired contract; no wage increase except that employees would progress from the minimum wage rate to the maximum rate for each job in 10-cent-per-hour increments rather than 5-cent-per-hour increments; and health insurance through Lincoln National Life only if employees paid the entire premium. Respondent still called for elimination/freezing of the pension program.

The Union responded by noting that if employees paid for health insurance entirely themselves, their hourly wages would effectively fall below the minimum wage. Case replied, ''You have our final offer.''

The Union stated that it would take Respondent's proposal to the membership that coming weekend, on April 14.

On April 12, Case sent a letter to the local union confirming its ''last, best and final offer'' in writing. The membership met as scheduled, and rejected this proposal.

Late April 1991: Further Exchange of Correspondence

On April 22, 1991, Case sent a letter to Region 11 Agent Stiffler concerning settlement of the outstanding unfair labor practice complaint. In this letter, Case offered as part of a settlement that any employee who could prove any loss of money under the Lincoln National coverage as compared to Metropolitan coverage would be reimbursed for the difference. It is undisputed that at that point Respondent had at least temporarily reinstated the pension program. In its ''last, best and final offer'' Respondent had still continued the demand that the pension program terminate/freeze. The Company had reinstated insurance coverage, although under a different carrier and with different terms. Respondent had also advanced different language for the settlement agreement and notice to employees than that originally proposed by Region 11. Nevertheless, Case's April 22 letter advanced the notion that it was her ''understanding that the case can now be unilaterally settled.''

On the following day, April 23, Stiffler faxed a letter to Case with an attached settlement agreement and notice to employees. Case signed the settlement documents and faxed them back to Stiffler that same day.

On April 24, Stiffler sent a letter to Daily, enclosing a copy of the settlement agreement and notice to employees. Stiffler invited Daily to sign the settlement.

11. April 25 and 26, 1991: negotiation sessions 14 and 15

On April 25 and 26, the parties again met in conjunction with an FMCS mediator. At the April 25 meeting, neither party presented any new proposals, and no concessions were made or tentative agreements reached. The Union notified Respondent that it would not enter into a settlement of the unfair labor practices charges as proposed by Stiffler.

At the meeting on April 26, the Union presented a counterproposal. Like the one before it, the Union's proposal stated that its flexibility would depend on Respondent's ''beginning to move on the remaining major issues.'' To this proposal, however, Respondent replied, ''You've got our final offer.''

Events from April 30 to June 1, 1991

On April 30, counsel for the Union wrote to Region 11 objecting to the proposed settlement of the outstanding unfair labor practice complaint. In part, the letter objected to the settlement because of the required employee proof of loss as between Lincoln National and Metropolitan insurance cov-

erage. The letter also stated that there was no proof Respondent had made the pension and insurance payments.

On May 2, Case and law partner Robert Valois drove from Raleigh to Winston-Salem, North Carolina, to meet with Field Examiner Stiffler, Trial Attorney Don Gattalaro, and Regional Attorney Ron Morgan for the purpose of attempting to finalize a unilateral settlement. During that meeting, Respondent was notified that the Union was raising additional unfair labor practice allegations which would have to be investigated before any unilateral settlement could be finalized. Certain exclusionary language was added to the existing proposed settlement agreement stating that it did not cover potential allegations raised in the new unfair labor practice charge ''or any allegations of bad faith bargaining since January 15, 1991.'' This added language was initialed by Respondent's counsel. According to Respondent, they were then told by Stiffler and Morgan that the Regional Director would sign the unilateral settlement either that day or the following day.

On May 3, 1991, the Union faxed a letter to Region 11 enclosing a new unfair labor practice charge, docketed on May 6 as Case 11–CA–14401. On Monday, May 6, Region 11 notified Respondent that the Regional Director would not be approving or signing the unilateral settlement because the Union had filed this new unfair labor practice charge.

On May 6, 1991, the Union wrote to Respondent officially notifying it of Respondent's ''last, best and final offer'' having been rejected by the union membership. The letter requested additional bargaining. Case faxed an immediate reply to the Union, stating:

> We hereby notify you that the Company will implement its last offer on June 1, 1991. . . . As set forth in the offer, each employee will be responsible in May, 1991, for paying to the Company his or her entire June premium in advance. The employees will bear the risk set forth in the Company's offer, one of which is the risk that the group will fall below the minimum number required by the insurance company for minimum group coverage.

On May 8, Respondent posted a notice to employees notifying them that the pension program would be frozen; that it would be up to them individually to begin paying a premium for group insurance coverage; and that Respondent would cease paying premiums for group insurance coverage on June 1.

On May 9, Case wrote to the Union stating in part, ''The offer rejected by the membership was, indeed, the Company's last offer. I do not understand your mission in meeting again.'' Respondent, however, did agree to met.

12. June 5, 1991: the final session

The parties met one last time on June 5, 1991. Nothing was resolved.

B. *Analysis and Conclusions*

Counsel for the General Counsel argues that throughout negotiations, Respondent negotiated in bad faith and with no intention of entering into a final or binding collective-bargaining agreement with the Union, that Respondent dealt directly with its employees by posting various notices to them during negotiations, and that Respondent unilaterally and unlawfully implemented its contract proposals following an unlawfully declared impasse in negotiations. Counsel for the General Counsel also argues that subsequent to December 5, 1990, the date of the first unfair labor practice charge in the instant matter, Respondent tailored its proposals and tactics to create a facade of good-faith bargaining.

The Union argues that Respondent tailored its proposals with a predesigned effort to frustrate agreement, that Respondent violated the Act by unilaterally implementing its proposals in the absence of a bargaining impasse; and that the presence of uncured unfair labor practices prevented a valid impasse from being reached after November 19, 1990. Counsel for the General Counsel and the Union both point out substantial similarities between this case and the Board decision in *America Meat Packing Corp*., 301 NLRB 835 (1991).

Respondent argues simply that it has ''prevailed in a contest of economic strength.'' Respondent's posthearing brief most succinctly states its position as follows:

> In this case, it must be noted that the relative economic strength of the parties was displayed as the negotiating process progressed, and as was true in prior years. The Union has never engaged in a strike. Even as the membership rejected the employer's contract proposal, the employees themselves repeatedly voted not to strike. Moreover, in the prior contract negotiations between the parties, the Union agreed to a number of significant concessions, including a wage cut for the largest group of employees.
>
> The one party—in this case the Union—who loses a contest of economic strength will inevitably regard the other party's position as ''too drastic'' or ''too far-reaching'' or ''regressive'' instead of recognizing economic reality.

Respondent argues that it simply engaged in hard bargaining, and won!

Cases of this kind are never easy, particularly where, as here, the parties have had a long history of collective-bargaining. From the outset, it is important to keep in mind the distinction between surface bargaining and bad-faith bargaining. In these types of cases involving employers ''surface bargaining'' is a term used by the Board and the courts where the employer is actually trying to avoid reaching any agreement with the Union, simply going through the motions of bargaining. ''Bad-faith bargaining,'' on the other hand, is the term normally used where an employer is bargaining from a fixed position with a closed mind, often trying to push to impasse as soon as possible to institute a final offer.[4]

The facts in this case do not support a conclusion that Respondent was engaged in surface bargaining, carrying out a preconceived plan to avoid reaching agreement with the Union. On the other hand, the facts here, discussed in greater detail below, reveal very clearly that Respondent simply did not care whether it ever reached agreement with the Union, that Respondent had its own preconceived fixed agenda to

[4] Obviously a third possibility exists in cases such as these, where an employer simply engages in hard bargaining, trying to get an agreement most favorable to it but trying nevertheless to reach an agreement with the Union who represents its employees.

eliminate health insurance and pension expenses, not because of any need but simply, as Respondent's own counsel stated, out of ''desire.'' As a result of this preconceived agenda, which it knew the Union would not agree to, Respondent hurried as fast as possible to achieve ''impasse'' in order to implement its agenda, bypassing altogether any meaningful attempt at bargaining. For the reasons more fully explained below, I find that throughout negotiations Respondent has bargained with the Union in bad faith.

Respondent's original proposal to the Union on October 16 not only called for the elimination of union dues checkoff, elimination of paid grievance processing time for union stewards, elimination of superseniority for union officials, elimination of future pension benefits, and elimination of group insurance benefits, Respondent's proposal also demanded in effect that the Union waive its statutory right to represent employees in several important respects. Respondent did not simply demand elimination of arbitration; it demanded language providing that ''the decision of the [Company's] Industrial Relation Representative shall be final and binding.'' At the same time, Respondent demanded a no-strike clause. To place the final decision on grievances in the hands of an employer representative although at the same time insisting on a no-strike clause is so predicably unacceptable to any union as to be laughable. Respondent went even further in demanding that the Union give up its right to represent employees.

Concerning job posting and bidding, Respondent proposed that jobs be awarded on the basis of ability and skill, but that ability and skill ''be determined in the sole discretion of the Company.'' Respondent did not stop there. It even proposed eliminating the Union's ability to challenge a pay rate established by Respondent in a new or changed job.

Respondent relies on *I. Bahcall Industries*, 287 NLRB 1257 (1988), in which the Board adopted without comment the decision of an administrative law judge in which he stated that original contract proposals, no matter how repugnant they are to the other side, cannot be unfair labor practices in themselves. The principle of *Bahcall*, however, is far more narrow than Respondent would suggest. It is simply that initial contract proposals cannot normally be unfair labor practices in themselves. It does not, however, stand for the proposition that such proposals cannot be reviewed for the purpose of determining one's intent in bargaining. Not long after the *Bahcall Industries* case, the Board issued its decision in *Reichhold Chemicals*, 288 NLRB 69 (1988), approving language from *NLRB v. Mar-Len Cabinets*, 659 F.2d 995 (1981), stating:

> Proposal content supports an inference of intent to frustrate agreement when, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.

Thus, it is clear that although initial proposals may not be unfair labor practices in themselves, the content of such proposals can and should be considered in determining whether a party is intending to frustrate agreement, force impasse, or otherwise bargain in bad faith. See *American Meat Packing Corp*., supra, 301 NLRB 835. Considering the content of Respondent's initial proposal to the Union here, there could not possibly have been any doubt in Respondent's mind that many parts of it would be predictably unacceptable to the Union.

The second bargaining session, held on October 23, began by Attorney Margie Case, Respondent's primary spokesperson, giving back the Union a copy of its own initial proposal with various sections highlighted. At the first meeting, the Union accused Respondent of trying to turn the clock back to 1940 with its initial regressive proposal. At this second meeting, Case told the Union that the purpose of the highlighting was to show that it was the Union who was trying to turn the clock back. Case does not deny, however, that when the Union agreed to the 1987–1990 collective-bargaining agreement containing many concessions, Respondent told the Union that the Company would agree to restore these concessions if it continued to operate and prosper. Case's use of the highlighted contract proposal is a tactic which repeats itself not only throughout these negotiations, but throughout this unfair labor practice litigation. Respondent has consistently and repeatedly tried to keep the spotlight off itself first by pointing to actions of the Union during negotiations and later by pointing to a proposed settlement agreement allegedly negotiated with, and supposedly breached by, Region 11 of the Board. The time has come, however, for the spotlight to shine exactly where it belongs—on Respondent's unabashed greed and its resulting rush to impasse. At the October 23 bargaining session, Case explained Respondent's demand to eliminate health insurance and pension expenses by simply stating, ''A prudent man in times like these wants to make more money. We want to batten down the hatches. We want to decrease expenses so we can make more money in the face of financial forecast.'' When, at the meeting on December 4, the Union suggested that Respondent had said it wanted to eliminate pensions and insurance because it needed to make more money, Case unabashedly replied, ''I didn't say 'need' I said 'desire.'''

That Respondent intended from the outset to rush to impasse is shown not only by its original proposal in which it demands elimination of numerous benefits and it demands that the Union waive its right to represent employees in several respects, but also by discussions during early negotiation sessions concerning union-dues checkoff and arbitration. At the October 23 meeting, the Union challenged Case to explain why Respondent proposed to eliminate dues checkoff. Case replied that it was an issue of employee ''freedom.'' One cannot overlook the fact, however, that North Carolina is a right-to-work State and that employees already have complete freedom to choose whether to be, or remain, union members. At the third bargaining session held on November 1, when Case was again challenged to explain Respondent's demand concerning checkoff, Case said it was not only a matter of ''freedom'' but that a cost factor was also involved. When the Union countered by requesting information concerning the cost of providing dues-checkoff services, and these services were shown to be approximately $6 per year, Case later denied that cost was in any way a factor in Respondent's demand. Moreover, Respondent's stated concern about ''freedom'' as justification for eliminating union-dues checkoff was clearly a pretext. Dues checkoff had been in the collective-bargaining agreement for years. There is no reason to belive that Respondent suddenly became imbued with new-found ethics. This is particularly true since the

owners of Respondent also own Gilbert Manufacturing Company, located in New York State, whose collective-bargaining agreement includes both union-security and dues-checkoff provisions.

Respondent's bad faith is also revealed by Case's other actions at the third bargaining session held on November 1. The third session began by Respondent stating that it had permanently laid off three management employees, a claim Respondent was making in order to counter the Union's assertion that only employees had to bear the brunt of Respondent's various cutbacks. On further analysis, however, one sees that at least two, if not all three, management employees allegedly laid off were in fact eligible to draw retirement. At best, Respondent was simply blowing smoke at the Union; at worst it was outright lying. In either case, it was clearly attempting to deceive the Union.

Two other exchanges at the November 1 meeting are revealing of Respondent's desire to reach a quick impasse. Both involve discussions centered around Respondent's demand to eliminate arbitration. In the first exchange, Case actually stuck by Respondent's demand that a decision of a company representative be final and binding. Case tried to justify that demand by pointing out that the parties had a good record for settling grievances and arguing that arbitration was therefore unnecessary. When that line of ''logic'' failed, Case asked if the Union would accept all Respondent's other proposals if Respondent would simply agree to rescind its elimination of arbitration. By doing so, Respondent was still insisting not only that union-dues checkoff, health insurance, and pensions all be eliminated, but it was also continuing to insist that it be allowed to award jobs on factors ''determined in the sole discretion of the Company'' and that the Union give up any right to challenge any pay rate established by Respondent in a new or changed job. Respondent was continuing to insist that the Union waive statutory rights to represent employees in return for not eliminating arbitration as it had existed in prior agreements. Although Case made a point of wanting to go on record as having made this proposal, there can be little question that Respondent knew full well that it would be unpalatable to the Union.

In order to create the impasse Respondent so clearly desired, Case cleverly waited until the end of the meeting to play her ''wild-card.'' The Union had already stated it was going to file unfair labor practice charges with the Board concerning Respondent's demand to eliminate arbitration while maintaining the no-strike clause in the expired contract. At the close of the meeting on November 1, Case then asked the Union if they wanted to set another meeting date. The Union, who was not being represented by counsel in these negotiations, foolishly refused to schedule another meeting date, stating it would ''prefer'' to wait clarification from the Board. Case, an experienced labor lawyer, had not only been able to engineer something she could call an ''impasse,'' but one that she was able to blame on the Union. That is precisely what Case did in her letter to the Union dated November 2. Respondent then seized on that opportunity to state, ''At the expiration of the current contract, the Company will implement its offer which is now on the table.''

In response to Respondent's November 2 letter, the Union contacted FMCS and asked that it try to arrange another bargaining session. FMCS did so and a meeting date was arranged. Obviously Respondent knew that it had not contacted FMCS, and therefore had every reason to believe the Union had done so. Respondent's letter of November 14 nevertheless stated, ''We have still heard nothing from the Union concerning its refusal to meet which is causing the impasse at which the parties now find themselves. Commissioner Bradley from FMCS has contacted us with a request that we meet . . . .'' Case's phraseology evidences that she was not interested in real substantive negotiation, but was totally consumed with gamesmanship. Case's November 14 letter continued by stating, ''The Company still plans to implement its proposal at the expiration of the present contract with two exceptions which constitute changes from its last position.'' To declare in the same sentence that Respondent still planned to implement its proposal although announcing modifications for the first time reveals with certainty both that the parties were not at impasse and that Respondent had no intention of bargaining about its modifications. Respondent was in effect announcing a fait accompli.

Any lingering doubt that implementation of Respondent's proposal was a fait accompli is eliminated by its actions during the meeting on November 19. At that meeting, the Union proposed concessions if Respondent would agree to leave arbitration as it was in the existing contract. Part of the Union's proposal included its agreement to Respondent's proposal to eliminate the ''successor clause'' and its agreement to Respondent's proposal to terminate seniority after a layoff of 12 months or the employee's length of service, whichever is less. In conjunction with this proposal, the Union proposed extending the existing contract on a day-to-day basis while the Union analyzed insurance information it had just been given by Respondent in order to give the Union time to formulate a response. Respondent responded by noting that the contract expired at midnight that night and asked if an analysis of the information provided concerning pensions and insurance would permit the Union to agree to Respondent's proposal eliminating them. This response clearly reveals a predesigned fixed position to eliminate both insurance and pension. Respondent stated then that it was prepared to give the Union its ''last, best and final offer.''

Respondent's ''final offer'' was a reiteration of its original proposal with modifications to drop its proposal to remove successorship language which from the contract, to drop its proposal eliminating arbitration, to eliminate pension at the end of the month rather than immediately, and to eliminate insurance at the end of the year rather than immediately. Respondents dropping its proposal to remove successorship language from the contract shows it was not really listening to the Union only moments before when the Union agreed to eliminate successorship language from the contract. That Respondent was rushing to impasse and that its final offer was a fait accompli is clearly shown by the fact that Respondent announced it would implement its final offer at midnight that very night. Equally revealing is the fact that Valois, Case's cocounsel, announced Respondent's intention to implement that final offer even before Case read the offer aloud.

I find that when Respondent implemented its ''final offer'' at midnight November 19, 1990, it did so without there being a true impasse with the Union and, further, after a course of bad-faith bargaining. Respondent's course of bad-faith bargaining continued throughout December 1990, and I agree

with counsel for the General Counsel that after Region 11 announced it was issuing a complaint against Respondent, Respondent tailored its proposals and tactics to create a facade of good-faith bargaining.

The parties held only their fifth meeting on December 4, 1990. At that meeting, the Union stated that it had formulated a contract proposal regarding insurance which it was prepared to discuss. Case responded by asking the Union for a ''complete proposal.'' When the Union in turn asked Case if she had the authority to change Respondent's offer, Case stated only that she had the authority to consider a proposal from the Union, adding that she would consider a ''complete proposal.'' Respondent's attitude throughout bargaining is revealed by Case's added comment, ''Maybe it will be better; maybe you will offer that the Union pay for insurance and take a $2 per hour wage cut—how do I know? I will look at a complete proposal.'' This same attitude is reflected in Case's December 13 letter to the Union in which she once again stated Respondent would consider any offer made by the Union only because the Union might offer a proposal more favorable to Respondent then Respondent's own ''last, best and final offer.''

After Respondent had been notified a complaint and notice of hearing would issue, Case wrote to the Union on January 11, stating, ''Until a final decision or resolution of the Union's charges with the NLRB is reached, or until the parties either enter a collective-bargaining agreement or reach impasse, we are withdrawing our implementation of our last, best and final offer.'' Immediately thereafter, however, Case renewed Respondent's push to achieve impasse.

At the bargaining session on January 15, Moyer no longer represented the Union. When Daily and Robinson, who would represent the Union from that point on, stated they would need more time to make a complete proposal regarding insurance, Case pushed the Union to try to discuss the status of each and every proposal then on the bargaining table. When Daily and Robinson indicated they were not prepared to do that, Case insisted on preparing her own summary of each and every proposal, including both Respondent's position and what she thought was the Union's position. On the very next day, January 16, Case wrote to the Union asking for a response to her document, which she had titled, ''Company's Proposal and Counter Proposal to Union's Proposal.'' Also on January 16, Case wrote to NLRB Region 11 claiming, as a part of Respondent's effort to settle the outstanding unfair labor practice complaint, that Respondent had already restored the pension plan, reinstated superseniority, and restored the insurance plan. On that same date, in its letter to the Union, Case admitted there were differences between the prior insurance plan and that which Respondent was instituting. Although Case claimed in the letter to the Union that this ''distinction does not in any way lesson the coverage or have an economic effect,'' the Union discovered, quite correctly, that even the program description issued by the new insurance carrier, Lincoln National, specifically warned that ''you may incur greater out-of-pocket expenses'' as a result of requirements not imposed by Metropolitan, the previous carrier.[5]

Respondent's preoccupation with appearance rather than substance is reflected again by its actions at the negotiation session on February 8, 1991. At that meeting, the Union presented a proposal which stated that it was ''conditional on the grounds that the Company is willing to make major concessions.'' Having examined the proposal, Case repeatedly focused discussion on the statement that the proposal was ''conditional.'' Case first asked if all the proposals were conditional. She then asked if the proposal was conditional on ''major concessions'' in every one of the five major areas. When the Union responded, ''We didn't say that . . . we want meaningful offers on those items,'' Case was still not satisfied. Rather than attempt to discuss or negotiate over substantive issues, Case continued to focus on what ''conditional'' meant.

It was not until the meeting on February 13, 1991, that any meaningful bargaining took place. In a counterproposal presented at that meeting, Respondent proposed revocable union-dues checkoff, to be deducted only when the employee received a paycheck. Respondent withdrew its proposal to give only unpaid time off for union grievance committeemen in the settlement of grievances. Respondent proposed to ''grandfather'' existing employees from the extended probationary period in its earlier proposals and from its proposal to terminate seniority for layoffs where length of service is less than 12 months. Respondent proposed superseniority for two individuals and modified its proposal that seniority not be a factor in shift assignments. Respondent also proposed, or agreed, that the grievance-and-arbitration procedure remain as it was in the expired agreement. Although this counterproposal for the first time reflected some movement and some genuine effort by Respondent to fashion proposals in a way which might resolve issues to the satisfaction of both Respondent and the Union, it must also be noted that Respondent's counterproposal still reflected no movement on major economic issues such as wages, or the elimination of health insurance and pensions.

The meeting of March 7 represented only the second real attempt at significant substantive bargaining. At that meeting, the Union presented a new proposal emphasizing the five major issues of wages, insurance, pensions, union dues checkoff, and superseniority. In response to this, Respondent presented another counterproposal agreeing to keep the arbitration procedure, accepting the Union's specific language about the probationary period, proposing to add two more union stewards with superseniority if Respondent were to start a third production shift, and significantly for the first time withdrawing Respondent's proposal that ''ability and skill'' for job-bidding purposes be determined ''in the sole discretion of the Company.'' At the same time, Respondent offered no hint of any concession on wages, or the elimination of insurance or pensions.

At the negotiation session on April 10, Respondent presented the Union with another ''last, best and final offer.'' For the first time, Respondent proposed restoration of union-dues checkoff and superseniority as they had existed in the expired contract. It continued to propose a wage freeze and the elimination of pension benefits. Respondent proposed

[5] I agree with the Union's argument that by unilaterally instituting a new and different insurance carrier with new and different terms, Respondent was not only failing to restore the status quo, but was actually using settlement discussions with Region 11 as a smokescreen for additional unilateral changes which were never negotiated with the Union.

health insurance through Lincoln National, but only if employees paid the entire premium. When the Union responded by noting that if employees paid for health insurance entirely themselves, their hourly wages would effectively fall below the minimum wage. Case replied, ''You have our final offer.'' Indeed, Case's final offer of April 10 reflects clearly that Respondent was bargaining from the very beginning from a fixed position on freezing wages and eliminating health insurance and pensions. It also shows that although Respondent had earlier attempted to bargain to impasse on eliminating union dues checkoff and superseniority, Respondent was actually willing to move in these areas. It shows that Respondent had earlier insisted on eliminating these provisions primarily to frustrate agreement, establish an impasse, and institute its final offer.

Finally, I reject Respondent's claim that it ever negotiated any settlement of any of the issues before me with Region 11, or that the General Counsel should be estopped from litigating the instant case. Respondent's January 11 letter to the Union stated that it was withdrawing implementation of its ''last, best and final offer . . . until a final decision or resolution of the Union's charges with the NLRB is reached.'' Thus, it is clear Respondent knew as of January 11 there was no settlement. Case's letter of February 27 to Region 11 again refers to the ''possibility of settlement.'' Apparently Valois and Case claim that it was during their trip to Region 11 on May 2 that a settlement was completed. Case and Valois both testified that during discussions with the Regional attorney, they were specifically assured that the Regional Director would sign a unilateral settlement the following day. Even assuming this is true, it is clear that no settlement was finalized.

Section 101.9 of the Board's Rules and Regulations clearly sets forth the procedure involved in approving unilateral settlements. That section specifically provides the charging party not only an opportunity to object to such a unilateral settlement, but also an opportunity to appeal such a settlement to the General Counsel. Section 101.9(c)(3) provides:

> If the settlement agreement approved by the Regional Director is an informal one, providing for the withdrawal of a complaint, the charging party may appeal the Regional Director's action to the General Counsel, as provided in Section 102.19 of the Board's Rules and Regulations.

Case is an experienced labor lawyer. Yet when I asked her about her familiarity with unilateral settlements, she denied any familiarity with this section of the Rules and Regulations. I found Case totally incredible on this issue. Robert Valois, her cocounsel, at least had the grace to admit he knew the Union had the right to file objections, while professing no knowledge of what the Regional Director would do if such objections were found to be meritorious. Valois started his career as a field examiner with the Board. After working for the Board a number of years and obtaining his law degree, Valois entered the private practice of law, where he has specialized in labor law. I find it simply incredible not only one, but two experienced labor lawyers from the same firm claim to be unfamiliar with a charging party's appeal rights in cases of unilateral settlements. Whether they are actually so ill prepared as to be unfamiliar with this section of the Board's Rules and Regulations, however, is simply not the issue. The Board's Rules and Regulations in this area have been in effect for years. Counsel is at least charged with constructive notice of the Board's Rules and Regulations. The fact is that Respondent's counsel and Region 11 personnel discussed the possibility of a unilateral settlement. But when the Union stated its objection to the proposed settlement, as provided for in the Board's Rules and Regulations, and filed an additional unfair labor practice charge, the Regional Director decided not to approve the unilateral settlement. Even if he had done so, however, the Union could have appealed that action to the General Counsel. If the General Counsel sustained that appeal, approval of the unilateral settlement by the Regional Director would be null and void. Therefore, even assuming that Region 11 employees predicted or represented to Case and Valois in the meeting on May 2 that the Regional Director would sign the unilateral settlement, Case and Valois had no right to rely on such a prediction or representation as in any way finalizing a settlement. Moreover, I note that in fact Respondent never posted the notice to employees which was to be a part of that settlement, nor ever took any other action to provide employees with assurances, either verbally or in writing, that Respondent would remedy earlier unfair labor practices. Respondent's claim that a settlement was consummated in this matter or that the General Counsel should in some way be estopped from litigating this matter is an argument based on incredible representations from Respondent's own counsel and is utterly without legal foundation whatever. It is in actuality simply one more attempt by Respondent to keep the spotlight off itself by focusing it instead on someone else. This repeated attempt to avoid careful scrutiny of its own actions must fail.

CONCLUSIONS OF LAW

1. Respondent Larsdale, Inc. (Burkart Carolina) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, and its Local Union 265FW is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Beginning in October 1990, and continuing thereafter, Respondent bargained with the Union with a preconceived fixed agenda, hurrying as fast as possible to achieve ''impasse'' in order to implement its agenda, bypassing altogether any meaningful attempt at bargaining, and thereby bargained in bad faith throughout negotiations with the Union in violation of Section 8(a)(1) and (5) of the Act.

4. During its period of bad-faith bargaining with the Union, Respondent unilaterally implemented an offer without there being a true impasse, and in so doing Respondent unilaterally eliminated employee pension plan payments; unilaterally eliminated employee health insurance; unilaterally discontinued the employees' seniority plan, including superseniority for union officials; and thereafter laid off employees Jeannie Jackson and John Leonard as a result of the unilateral continuance of the seniority plan; and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

5. In purporting to restore health insurance, Respondent unilaterally instituted a new and different insurance carrier with new and different terms of coverage without notifying the Union or giving it an opportunity to bargain about such

matters, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.[6]

6. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

The complaint contains an allegation that notwithstanding restoration of contributions to the health insurance plan, Respondent thereafter in bad faith proposed elimination of the contributions and unilaterally ceased to make such contributions on or about June 1, 1991. For reasons stated in the decision above, I have found that Respondent continued to bargain in bad faith throughout the period of negotiations with the Union here. I have also found that in purporting to restore health insurance benefits, Respondent engaged in further unilateral changes in violation of Section 8(a)(1) and (5) of the Act. No separate finding is necessary that in again eliminating health insurance Respondent violated Section 8(a)(1) and (5) of the Act. Respondent will be ordered to restore the status quo ante as it existed prior to the first elimination of health insurance coverage. Restoration of the Lincoln National health insurance coverage does not constitute restoration of the status quo. Restoration of Metropolitan coverage is required.

The complaint also alleges that notwithstanding restoration of contributions to the pension plan of its employees, Respondent thereafter proposed elimination of such contributions, and unilaterally ceased making such contributions on or about June 1, 1991. As stated previously, I have found that Respondent continued to bargaining from a fixed position and in bad faith with the Union throughout negotiations. Respondent shall be ordered to restore the status quo ante as it existed prior to the initial elimination of pension plan payments. Although the complaint alleges that Respondent ''restored'' such payments, no evidence was presented to me that Respondent restored such payments in such a manner as would be required pursuant to a Board order. Moreover, it is clear that Respondent did not fully restore the status quo resulting from all of its unilateral changes, as evidenced by changes in the health insurance coverage described above. Therefore, it is clear that Respondent has not fully remedied unilateral changes resulting from the unlawful imposition of its November 21 offer to the Union. Accordingly, an order requiring Respondent to restore the status quo is appropriate, and a full restoration of the status quo from the point of compliance back to November 1990 is anticipated and included within this remedy.

[Recommended Order omitted from publication.]

[6] Although the matters covered in this finding are not specifically alleged as violations of the Act in the complaint, they are like and related to allegations which are contained in the complaint that Respondent bargained in bad faith and made various unilateral changes. Accordingly, this finding is appropriate.